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CASE NO. A-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA
HOLIDAY INN,

Petitioner

v.

LIQUOR CONTROL COMMISSION,
STATE OF OHIO,

Respondent

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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QUESTION PRESENTED

Regulation 4301:1-1-44 of the Ohio Liquor Control Commission which regulates advertising of alcoholic beverages is a legitimate exercise of the state police power to protect the public health, safety, and welfare of the citizens of the State of Ohio.

STATUTE INVOLVED

This appeal raises the question of the validity of Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio, which is adequately set forth in the Appellant's Jurisdictional Statement.

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CASE NO. A–826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA HOLIDAY INN,

Petitioner

v.

LIQUOR CONTROL COMMISSION, STATE OF OHIO,

Respondent

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS

The Appelle moves the Court to dismiss the appeal herein on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of the Supreme Court of Ohio which held Regulation 4301-1-1-44 of the Liquor Control Commission not to be an unconstitutional restraint on the exercise of First Amendment rights.

This case involves a violation of 4301-1-1-44, a regulation of the Ohio Liquor Control Commission. Specifically, this case relates to the improper advertising of alcoholic beverages by an agency and/or employee of the permit holder.

On November 29, 1978, pursuant to assignment and notice thereof, this matter was called for hearing before the Liquor Commission.

At the hearing before the Commission, Investigator Gene Brill of the Ohio Department of Liquor Control testified concerning the improper advertising contained in a newsletter mailed out by an employee of the permit holder, Jeff Ruby. This newsletter was written and published by the permit holder under the name of "Skywriting". The newsletter was offered into evidence. The newsletter contained two items which referred to the price of drinks to be served on the premises. One item was about a Coy Bacon being traded to be held on September 10th wherein drinks were seventy-nine cents ($.79) from 7:00 P.M. to 11:00 P.M. The other article was in reference to a perpetual drink motion wherein a customer would receive a receipt entitling him to a fifty cent ($.50) drink good during the lunch hour by buying a cocktail during 5:00 P.M. to 7:00 P.M.

Further testimony by Investigator Brill and Jeff Ruby, the employee in charge of the newsletter clearly proved that this newsletter was mailed to persons outside the permit premises.

On April 17, 1979, the Liquor Control Commission issued an order under Case No. 1886-78, wherein they found that these violations did occur and were supported by the evidence. On the basis of the evidence presented, the Commission ordered the permit suspended for a period of seven (7) days. On April 20, 1979, the permit holder filed a Notice of Appeal from this Order to the Court of Common Pleas of Hamilton County. That Court found that the Commission's Order was unsupported by reliable, probative and substantial evidence, and not in accordance with law, and reversed the decision of the Commission.

On December 11, 1979 an appeal was filed on behalf of the Liquor Control Commission to the First District Court of Appeals found that the Commission's Order was supported by reliable, probative and substantial evidence and was in accordance with law, and reversed the decision of the Hamilton County Common Pleas Court. The First District Court of Appeals also ruled that the regulation in question was not an arbitrary or capricious exercise of governmental authority; nor was this regulation a restraint on the exercise of First Amendment rights.

The Appellant then filed an appeal to the Supreme Court of Ohio where jurisdiction was granted. However, as stated earlier the Supreme Court of Ohio ruled that Regulation 4301:1-1-44 of the Ohio Liquor Control Commission was proper in advancing the substantial governmental interest of minimizing the evils of alcoholic beverages. The Supreme Court of Ohio used the test set forth in the matter of **Central Hudson Gas & Electric Company v. Public Service Commission of New York**, 447 U.S. 557 (1980).

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT ALREADY DECIDED BY THIS COURT.

It is a well settled principal that there are many evils inherent in the liquor industry. These "evils" have been readily apparent and are not merely an esoteric term, as emphasized by the United States Supreme Court in **Ziffrin v. Reeves**, 308 U.S. 132 (1939), at page 138:

> "The State's power to prohibit absolutely includes the lesser power to permit manufacture, sale, transportation of possession, subject to prescribed conditions which are

> not unreasonable and which subserve the policy of confining the liquor traffic in order to minimize its evils. . ."
> (Emphasis added)

The Court was even more emphatic on this point in the case of **Crowley** *v.* **Christensen,** 137 U.S. 86 (1890). At page 91, the Court states:

> "Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, . . . Their sales in that form may be absolutely prohibited. It is a question of public expediency and morality, and not of federal law. The public power of the State is fully competent to regulate the business — *to mitigate its evils* or suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of a state or of a citizen of the United States. As it is business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. *The manner and extent of regulation rest in the discretion of the governing authority."*
> (Emphasis added)

Similarly, the Court held in **Walding, Kinnan and Marvin Company v. Department of Liquor Control,** 305 U.S. 560 (1938), that engaging in the alcoholic traffic is not an inherent right protected by either the Federal of State Constitution.

The Appellant contends, that despite all of the aforementioned principles, that purely commercial speech, as here, enjoys the protection of the First Amendment. The majority of the cases cited by the Appellant in this area such as **Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.**, 425 U.S. 748, (1976) don't have anything at all to do with the regulation of alcoholic beverages. The major test in most of the cases cited by the Appellant is that the government regulation is valid only if the state can demonstrate that the regulation bears a substantial relation to a legitimate governmental interest.

As previously stated it is well established that the states are able to enact and enforce strict regulations concerning the manufacture, sale, transportation and dispositiion of alcoholic beverages which are reasonable and which serve the underlying policy of minimizing the substantive evils associated with alcoholic beverages. **Ziffrin v. Reeves**, 308 U.S. 132, (1939).

The main purpose of Regulation 4301:1-1-44 is to prevent advertising campaigns wherein low prices and discounts are offered in newspapers, billboards, hanbills, etc., which results in the encouragement of excessive consumption of alcoholic beverages. Additionally, competition between permit holders would be such that only the large corporate permit holder with unlimited advertising funds would be able to stay in business. Obviously, he could afford the short term losses by practically giving away his liquor pursuant to a mass advertising campaign. The young, impressionable teenager would be bombarded by advertisements throughout newspapers, handbills, billboards, radios, televisions, etc., and liquor would be shown in the same light as bubble gum, soft drinks, etc. Similarly, bars would seek to project the same "fun atmosphere," through advertisement, as that of a zoo or an amusement park. Such result was contemplated by the Commission when they enacted Regulation 44. The Twenty First Amendment of the Constitution specifically allows the individual States to

control the alcoholic traffic within their boundaries. Pursuant to such authority, the Liquor Commission, when enacting Regulation 4301:1-1-44, felt that it would be in the interests of protecting the public decency, sobriety, and good order to proscribe the manner of advertising alcoholic beverages in the State of Ohio.

Regulation 4301:1-1-44 is within the constitutional police power of the State, and it also furthers a substantial governmental interest by helping to discourage the excessive consumption of alcoholic beverages. It would not require much imagination to picture the problems of price wars at bars which would be triggered by the removal of Regulation 4301:1-1-44 which would in turn lead to excessive consumption and be harmful to the health, welfare, and safety of this State. This regulation is aimed at controlling the excessive consumption of alcoholic beverages which is a substantial governmental interest. As the Court stated in (1972) **California v. LaRue**, 409 U.S. 109, (1972) at page 114, ". . .The braod sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. . ."

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion to Dismiss was sent by regular U.S. mail to Mr. Samuel M. Allen, 2100 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202 on this _____ day of August, 1982.

THOMAS V. MARTIN
Assistant Attorney General